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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

DONALD E. SULLINS, *Petitioner*

v.

CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS, FOURTH APPELLATE DISTRICT, STATE OF CALIFORNIA

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	2
Reasons for granting the writ	5
Conclusion	22

Appendix A 1a
Appendix B 7a

CITATIONS

CASES:

Ashcraft v. Tennessee, 327 U.S. 274 11
Baldor v. Rogers, 81 So. 2d 658 19
Carnley v. Cochran, 369 U.S. 506 9
Crees v. Bd. Med. Examiners, 213 Cal. App. 2d 195, 28 Cal. Reporter 621 19
Escobedo v. Illinois, 378 U.S. 478 .....6, 7, 8, 9, 12
Gideon v. Wainwright, 372 U.S. 335 6
Hamilton v. Alabama, 368 U.S. 52 .....7, 11
Hamilton v. State, 271 Ala. 88, 122 So. 2d 602 11
Hitchcock v. Collenberg, 140 F.Supp. 894, 353 U.S. 919 .....19, 20
Johnson v. Zerbst, 304 U.S. 458 8
Killough v. United States, 315 F. 2d 241 (C.A.D.C.) 10
Massiah v. United States, 377 U.S. 201 .....6, 7, 8, 11, 12
McLeod v. Ohio, 381 U.S. 356 7
Oosteveen v. Bd. of Med. Examiners, 112 Cal. App. 201, 246 P. 2d 136 19
People v. Chavez, 77 Cal. App. 2d 621 13

Page

People v. Donovan, 13 N.Y. 2d 148, 193 N.E. 2d 628, 243 N.Y.S. 2d 841 and 13 N.Y. 2d at 151 n. 2, 193 N.E. 2d at 629 n. 2, 243 N.Y.S. 2d at 843 n. 2 7
People v. Montecino, 66 Cal. App. 2d 85 13
People v. Villalobos, 208 Cal. App. 2d 321 13
Powell v. Alabama, 287 U.S. 45 7
Rogers v. Richmond, 365 U.S. 534 6
United States v. Bayer, 331 U.S. 532 10
United States v. LaVallee, 330 F. 2d 303 (C.A. 2) .. 9
United States v. New Jersey, 351 F. 2d 429 (C.A. 3) 9
Walton v. State, 366 S.W. 2d 707 (Ark.) 11
White v. Maryland, 373 U.S. 59 .....7, 11

STATUTES:

Alabama Code, Tit. 46, Sec. 259 19
Calif. Bus. & Prof. Code, Sec. 1000-7 19
Colo. Rev. Stat. 91-1-6, 91-5-4 (1963) 19
Ill. Stat. Ann. Tit. 91, Sec. 9 19
Iniana Stat. Ann. 63-1312 (Burns ed.) 19
Iowa Code Ann. Vol. 9, Chap. 146.2 19
Kansas Stat. Ann. 65-6802 19
Michigan Stat. Ann. 14:533 19
Minn. Stat. Ann. 146:15 19
Ohio Rev. Code Ann. 4731.15 19
Va. Code 24-273 (1958) 19

MISCELLANEOUS:

Alexander, Reactions with Drug Therapy (1955) ..15, 16
Annual Report of the Department of Health, Education, and Welfare (1963) p. 124 14
Coming of Massiah: A Demand for Absolute Right to Counsel, 52 Geo. L. J. 825 12
The Curious Confusion Surrounding Escobedo v. Illinois, 32 U. Chic. L. Rev. 560, 561 (1965)—Note 12
Enker and Elsen, Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois, 49 Minn. L. Rev. 47, 85 et seq. (1964) 12
FDA Report on Enforcement and Compliance, Feb. 1965 16
Griswold, The Long View, 51 A.B.A.J. 1017 (1965) .. 12
Harris, The Real Voice, 1964 16

Page

Hearings before Intergovernmental Relations Subcommittee of House Committee on Government Operations, 88th Congress, 2d Sess., January 1965, p. 686 16
June 1964 at 865 16
April 1964 at 568, Exhibit No. 2 16
March 1964, p. 147 15

An Historical Argument for the Right to Counsel During Police Interrogation (Note), 73 Yale, L.J. 1000 (1964) 12

Ingelfinger, Relman and Finland, Controversy in Internal Medicine (1966) 17

Interrogation of Criminal Suspects (Note), 59 Northwestern U. L. Rev. 660 (1964) 12

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Max Levin, M.D., American Handbook of Psychiatry, 1223-30 (1959) 15

Henry Lindlar, M.D., Natural Therapeutics, 1-51 (1926) 18

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"No Absolute Safety," Journal American Pharm. Ass'n. 217-20 (May 1964) 15

Phenmetiazin and Foetal Abnormalities, British Med. Journal, Dec. 1962, p. 1610 16

Phocomelia and Internal Defects Due to Thalidamide, British Medical Journal, Dec. 1962, p. 1447 .. 16

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Remington, The Role of the Police in a Democratic Society, 56 J. Crim. L. C. & P. S. 361 (1965) 12

Report of Public Health Service in 1963, Annual Report of Dept. of Health, Education and Welfare, p. 125 14

The Right to Counsel During Police Interrogation: The Aftermath of Escobedo, 53 Calif. L. Rev. 337 (1965) 12

Dr. Benjamin Rush, The Progress of Medicine and The Vices and Virtues of Physicians, Lectures in 1801 21

Page

Joseph F. Sadusk, M.D., Life Magazine, July 3, 1964, p. 38, col. 4 15
Smith, XIX Assoc. of Food and Drug Officials of U.S. No. 4, p. 144-150 (Oct. 1955)—"Problems Raised by New Drugs"—"Evaluation of Safety of New Drugs," Journal of New Drugs, No. 2, p. 59 (March-April 1961) 15
H. M. Stationery, Off., Minister of Public Health, Deformities Caused by Thalidamide 16
Sutherland, Crime and Confession, 79 Harv. L. Rev. 21 (1965) 12
Thalidamide Babies, British Med. Journal, p. 523, (August 1962) 16
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Vorenberg, Police Detention and Interrogation of Unconselled Suspects: The Supreme Court and the States, 44 B. U. L. Rev. 423 (1964) 12
Max Waimbrand, N.D., D. O., The Encyclopedia of Natural Health 101 (1962) 16, 18
Washington Evening Star, October 25, 1965, January 4, 1964, and May 6, 1966 16
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Welsh, The Fixed Eruption (1961) and Side Effects of Antiobesity Drugs (1962) 15

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The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the District Court of Appeals, Fourth Appellate District, State of California, on October 5, 1965.

OPINIONS BELOW

The opinion of the Superior Court of the State of California, In and For the County of San Diego (App. A, *infra*, pp. 1a-6a) is not reported. The opinion of the District Court of Appeals, Fourth Appellate District, State of California (App. B, *infra*, pp. 7a-12a) is not reported.

JURISDICTION

The judgment of the District Court of Appeals, Fourth Appellate District, State of California, was entered on October 5, 1965. The Supreme Court of California denied a timely-filed petition to review on December 1, 1965. On February 25, 1966, Mr. Justice Douglas extended the time in which to file a petition for a writ of certiorari to and including April 30, 1966.

QUESTIONS PRESENTED

1. Whether the trial court erred in failing to exclude tape-recordings of interrogations of petitioner that were made without counsel and without advice that petitioner had a right to counsel and need not answer questions unless he so desired and without warning that any statements made by petitioner could be used against him in any charges that might be filed.

2. Whether petitioner's conviction for the death of his daughter violates his right and duty to choose for his daughter the healing art that, in his mature judgment, was best for her, and whether that choice could be of a dissident healing art not believed in by the judge, the prosecutor, or the majority of citizens.

STATEMENT OF FACTS

The facts in this case are, for the purposes of this petition, not in dispute and may be easily summarized. Petitioner believes that drug therapy is more harmful to the health than it is healthful and is unwilling to submit himself or his family to the risks attendant with the use of drugs. He also believes that natural hygiene is, on balance, a far more successful art of healing. Having made this deliberate choice, peti-

tioner practiced the tenets of natural hygiene on himself and his family.

When in 1963 his seven-year old daughter, whom he believed had heart trouble, became ill, he applied the principles of natural hygiene in treating her: including the principle of fasting (i.e. withholding all food but feeding her solely on water and for a time on juice). During this period, his daughter suffered from fever, although after he began a 14½ day fast her fever never reached its previous heights. This fast was instituted and maintained under the constant telephonic direction of the man whom petitioner believed to be the nation's outstanding practitioner of the healing art of his choice. After the fever subsided and temperature returned to normal, and after the fast was broken, petitioner's daughter died.

The evidence was in conflict as to whether the fasting was a contributing factor to the death. Some doctors felt that it was; others did not. None felt that it was the sole or even principal cause of death. The trial court found, and the district court of appeals affirmed, that it was a contributing cause of death.

Petitioner was convicted of involuntary manslaughter. In the course of the investigation of this asserted crime, petitioner was interrogated by a deputy sheriff at the sheriff's office. This interrogation was conducted without counsel and without any advice that petitioner had a right to counsel. Nor was petitioner advised, as far as the record shows, that he had a right not to answer questions.

The interrogation was recorded on tape by a machine in an adjoining room. The microphone was hidden in the room where the interrogation took place. Peti-

tioner was not advised that this interrogation was being surreptitiously taped for possible future use. This practice was described at the trial as "routine" and a "set pattern" of the office (Tr. 362, 413).

On appeal, petitioner asserted that his conceded choice of healing art was not and could not be a crime. He also asserted that the trial court erred in admitting the statements made by him during the interrogation, when he had no counsel and was not advised that he had a right of counsel and need not answer.

The district court of appeals affirmed, holding that sufficient evidence sustained "the conclusion that the defendant willfully subjected his daughter to a fast, when she was seriously ill, to prove his belief that fasting was a cure for illness even though he knew that in doing so her illness might result in death and that the fast was a major contributing cause of the pneumonia which was the immediate cause of death." The appellate court concluded that upon this evidence petitioner could be held criminally negligent.

The court of appeals noted petitioner's argument that he acted upon the advice of a hygienic practitioner in imposing the fast upon his daughter, that he acted in good faith, and that therefore his action could not be culpable. The court concluded that "the trial court was not required to accept either his testimony in this regard or his conclusions based thereon."

Petitioner's contention that his statements to the deputy sheriff should have been excluded was rejected on the following grounds: "the statements were made during the investigatory rather than the accusatory stage of the proceedings; the defendant was not in custody at the time; and, under the circumstances of

this case, the process of investigation conducted by the deputy sheriff was not such as to lend itself to eliciting incriminating statements." The court noted that the petitioner objected to the surreptitious tape-recording of the interrogation, but concluded that this "constituted no more than the adaptation of modern recording methods to general investigation procedures." Finally, the court concluded that "the statements made by the defendant did not constitute confessions and . . . that it is not probable that a different result would have occurred if the statements had not been admitted."

The Supreme Court of California, with two judges dissenting, denied review.

REASONS FOR GRANTING THE WRIT

This case presents two issues warranting further review by this Court. One is in an area in which this Court has spoken much in the past generation: the right of the state to obtain a conviction using admissions made by the defendant in the privacy of police quarters without counsel and without being advised by counsel. The other is in an area in which this Court has not spoken directly, but which needs an examination in the light of fundamental constitutional principles: the right of a man to choose for himself and for his family that healing art which he deems best and most appropriate. This question is as of much importance to the freedom and dignity of man as is the right to counsel, to be secure from unauthorized searches and seizures, and to be free from deprivations of liberty accomplished outside the requirements of due process. For this question involves the right to life itself, the right to choose among the admittedly imperfect arts of healing without having to face a cirminal charge if that choice should prove to have been in vain.

1. *The Right to Counsel.* That there is a federal constitutional right to counsel in state criminal proceedings can no longer be open to question.[1] The argument must now focus on the extent of that right: at what stage of the proceeding does it arise; by what formulae, if any, must it be exercised; how, if at all, can it be waived. Although the full penumbra of answers to these questions can not yet be given with any definitiveness, various guideposts are now certain. It is clear that the circumstance of the probable truth or falsity of the statement made is an immaterial factor.[2] It is clear that, should the questioned citizen request counsel, counsel must be furnished before further statements may be taken.[3] And it is clear that the citizen need not have been indicted[4] nor even be in custody.[5] It is enough if at some critical point in the case he give to the state damaging statements when he neither had counsel nor had intelligently waived counsel. And it is clear that the waiver of this fundamental right to counsel must be clearly shown and will not be presumed.[6]

The invocation of the right to counsel cannot be made to depend upon the expression of any particular incantation. This was the necessary holding of this Court

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[1] Gideon v. Wainwright, 372 U.S. 335; Escobedo v. Illinois, 378 U.S. 478.

[2] Rogers v. Richmond, 365 U.S. 534, 543; Hamilton v. Alabama, 368 U.S. 52, 55.

[3] Escobedo v. Illinois, 378 U.S. 478.

[4] Ibid.

[5] Massiah v. United States, 377 U.S. 201.

[6] Escobedo v. Illinois, 378 U.S. 478, 490 n. 14; Johnson v. Zerbst, 304 U.S. 458, 464.

in *McLeod* v. *Ohio,* 381 U.S. 356, which followed *Escobedo.* The Supreme Court of Ohio distinguished *McLeod* from *Escobedo* on the grounds that the defendant in *Escobedo* was already represented by counsel and requested permission to consult him, neither of which fact existed in *McLeod.* In reversing for further consideration in light of *Massiah* v. *United States,* 377 U.S. 201, this Court necessarily held that a request for counsel is unnecessary to the right as is the existence of a client-attorney relationship.[7] Thus it is immaterial here that petitioner did not request counsel at the time of his first interrogation by the deputy sheriff.

The right to counsel, this Court held in *Hamilton* v. *Alabama,* 368 U.S. 52, must be afforded at every "critical stage of the proceeding . . . ."[8] In *Hamilton* this stage was held to exist at time of arraignment because of its significance in Alabama procedure. In *White* v. *Maryland,* 373 U.S. 59, a preliminary hearing at which a confession was received was likewise held to be a critical point, despite the absence of procedural significance accorded in Alabama law. Upon the decision in *Massiah,*[9] it was thought that indictment was the point at which the critical stage arrived. But this was laid to rest in *Escobedo,* where it was stated in no uncertain terms that to draw such a "borderline" is to

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[7] See to the same effect People v. Donovan (as pertains to the codefendant Mencher), 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841, particularly the dissenting opinion, 13 N.Y.2d at 151 n. 2, 193 N.E.2d at 629 n. 2, 243 N.Y.S.2d at 843 n. 2.

[8] The pivotal term "critical" was borrowed from the majority opinion of Mr. Justice Sutherland in Powell v. Alabama, 287 U.S. 45, 57.

[9] 377 U.S. 201.

exalt "form over substance."[10] Instead, the test was held to be whether the investigation "has begun to focus on a particular subject."[11] When it focuses upon one person, and that person is subjected to interrogation by the state, a critical stage of the proceedings has arrived and the right to counsel has attached. That actual custody is unnecessary is shown by *Massiah*, where the statements were made to a police-planted confederate while the accused was not in custody. And the fact that there has not been a formal arrest can not be determinative either, for that too would be to "exalt form over substance."[12] Rather when the state is focusing upon one person as a possible suspect, and that person is being interrogated by a representative of the state, particularly within the confines of a police station or sheriff's office, the proceeding is critical to the future life or liberty of that person. He may have the technical right to leave or not to answer. But, assuming he is aware of his rights to leave or remain silent, it would take either the hardened criminal or an extraordinarily brave man to exercise such rights, alone, in such surroundings, without counsel.

The right to counsel may of course be waived.[13] But, as this Court has made abundantly clear, waiver of such a fundamental right must be "an intentional relinquishment or abandonment of a known right or privilege . . . ."[14] And courts are to "indulge every reason-

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[10] 378 U.S. at 486.

[11] Ibid.

[12] Ibid.

[13] Escobedo v. Illinois, 378 U.S. 478, 490 n. 14.

[14] Johnson v. Zerbst, 304 U.S. 458, 464.

able presumption against waiver . . . ."[15] Just four years ago, this Court, with considerable care, made clear the standard:

> Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.[16]

Thus, "it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request."[17] In the language of the Second Circuit: "Under this familiar standard, waiver may not be implied by the bare failure to act . . . ."[18]

It is therefore clear that for there to be a waiver *the record must show* that there was knowledge of the right and that the right was consciously and understandingly rejected. Thus in the words of *Carnley* v. *Cochran,* 369 U.S. 506, 516, the record must show that "an accused was offered counsel," which was then "intelligently and understandingly rejected." And in the words of *Escobedo,* even where the questioned person has requested counsel, indicating that he is aware of his rights, it is a material factor that "the

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[15] Ibid.

[16] Carnley v. Cochran, 369 U.S. 506, 516. The test has been specifically held "applicable to asserted waivers of the right to counsel in state criminal proceedings." Id. at 515.

[17] Id. at 513. See also United States v. New Jersey, 351 F.2d 429, 437 (C.A. 3).

[18] United States v. LaValle, 330 F.2d 303, 310 (C.A. 2).

police have not effectively warned him of his absolute constitutional right to remain silent.'"[19]

This record lacks any evidence of an offer of counsel, an intelligent and understanding rejection of such offer, or of a warning that petitioner had an absolute constitutional right to remain silent,[20] but it contains the affirmative evidence that the interrogating officer had arranged for the surreptitious recording of petitioner's statements through a hidden microphone,[21] a procedure that the deputy sheriff characterized as a "pretty well set pattern,"[22] and the trial judge recognized was "routine."[23]

That petitioner, after the first lengthy interview, consulted counsel and was then advised to cooperate and in fact did cooperate cannot be material. For the cat was already out of the bag and as it has been well stated there is no way to put it back again[24]—be it even assumed that the cat was not surreptitiously tape recorded. Nor can it make any difference that petitioner, presumably on advice of counsel, assumed the stand at the trial. Again, counsel was faced with a fait accompli, with which he had to do his best. That there was advice of counsel intervening between the various statements has been held to be an immaterial factor.[25]

The California court in this case made much of its conclusion that petitioner, in its view, may not have

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[19] 378 U.S. at 490-91.

[20] See Tr. 362-63.

[21] Tr. 360-62, 411-13.

[22] Tr. 413.

[23] Tr. 362.

[24] United States v. Bayer, 331 U.S. 532, 540.

[25] Killough v. United States, 315 F.2d 241 (C.A.D.C.).

been prejudiced by the obtaining of the damaging statements without counsel. Yet, actual prejudice is not the hallmark of the constitutional right to counsel. This Court was faced with the very problem in *Hamilton* v. *Alabama,* 368 U.S. 52, 55, where the Alabama court, like the California court here, rejected a right-to-counsel argument on the ground that the defendant had not been "disadvantaged in any way by the absence of counsel . . . ."[26] This Court, in rejecting that rationale, made clear that, where constitutional right to counsel is not met, "we do not stop to determine whether prejudice resulted."[27]

The California court also made much that when without counsel petitioner did not in haec verba confess to a crime. He did not incant the magic formula: I am guilty. But to require such incantation for the exercise of the constitutional right to counsel again exalts form over substance. It did not require this Court to recognize that "the admissions that were elicited by the prosecuting attorney may well have been as damaging as a plea of guilty. . . . If Walton had been represented by counsel . . . his attorney would certainly have warned him that he was not compelled to answer any questions . . . ."[28]

Thus this case presents in stark relief a rejection of the principles evolved by this Court. Petitioner was called to the state's officer and, along with that officer in a private, interior office, without counsel, he was inter-

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[26] Hamilton v. State, 271 Ala. 88, 93, 122 So.2d 602, 607.

[27] 368 U.S. at 55; White v. Maryland, 373 U.S. 59, 60.

[28] Walton v. State, 366 S.W.2d 707, 709 (Ark.), upon remand for reconsideration in light of Hamilton v. Alabama. See 371 U.S. 28. See Massiah v. United States, 377 U.S. 201; Ashcraft v. Tennessee, 327 U.S. 274.

rogated concerning an event as to which he could be the only accused. The investigation had clearly focused upon him. That charges had not yet been filed or even that the investigating officer was unaware that they ever would be filed cannot be a material factor. It is petitioner's right to counsel while he stood alone against the state that is at issue. The denial of this right, and the questions raised by that denial, warrant further review by this Court.[29]

The State of California urged in the courts below that in this case there are differentiating factors: petitioner had not been formally placed under arrest; the interrogating officer did not know whether charges would be brought; there was merely an investigation being performed. Should these be limitations upon the right to counsel, they should be drawn only after plenary review by this Court. The right to counsel is

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[29] Further development of the significance of these questions may be found in Note, The Coming of Massiah: A Demand for Absolute Right to Counsel, 52 Geo. L.J. 825 (1964); Kamisar, "Equal Justice in Criminal Procedure," Criminal Justice in Our Time, Howard ed. (1965); Griswold, The Long View, 51 A.B.A.J. 1017 (1965); Vorenberg, Police Detention and Interrogation of Uncounselled Suspects: The Supreme Court and the States, 44 B.U.L. Rev. 423 (1964); Remington, The Role of the Police in a Democratic Society, 56 J. Crim. L. C. & P. S. 361, 364 (1965); Enker and Elsen, Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois, 49 Minn. L. Rev. 47, 85 et seq. (1964); Dowling, Escobedo and Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure, 56 J. Crim. L. C. & P. S. 143, 157 (1965); Note, An Historical Argument for the Right to Counsel During Police Interrogation, 73 Yale L.J. 1000 (1964); Note, The Right to Counsel During Police Interrogation: The Aftermath of Escobedo, 53 Calif. L. Rev. 337 (1965); Note, Interrogation of Criminal Suspects, 59 Northwestern U. L. Rev. 660 (1964); Note, The Curious Confusion Surrounding Escobedo v. Illinois, 32 U. Chi. L. Rev. 560, 561 (1965); Sutherland, Crime and Confession, 79 Harv. L. Rev. 21 (1965).

nationwide as well as fundamental. The implications of delimiting that right upon formalistic distinctions warrants review in this Tribunal.

2. *The Right To Choose a Healing Art.* This case concerns a father raising his daughter and exercising his best judgment in doing so. In the exercise of this judgment he chose to follow one of the several healing arts available in this country. Unfortunately, his child died. Because this healing art is a dissident one, not followed by the majority of Americans, he is held accountable. This raises fundamental questions as to the rights of a citizen and of a parent to minister unto himself and to his children as he believes best.

It would be well to note at the outset what is not involved in this case. This case does not involve the right of one to hold himself out as a practitioner. It does not concern the right of the state to require a license or an examination of those who so hold themselves out. Nor does it involve the power of the state to prohibit any except licensed practitioners from offering their talents to the public. Finally, it does not involve the right, if there be such right, of the state to step in as parens patriae, replacing the parent in the care of the child and the exercise of judgment concerning that care.

This case also does not involve a parent who has abandoned his child or in callous disregard of that child has mistreated or neglected her.[30] Rather, this is

[30] Compare People v. Chavez, 77 Cal. App. 2d 621, 176 P.2d 92 (child stranded to die by mother); People v. Villalobos, 208 Cal. App. 2d 321, 25 Cal. Reptr. 111 (child scalded to death by mother); People v. Montecino, 66 Cal. App. 2d 85, 162 P.2d 5 (elderly woman confined to bed abandoned without care by one who had undertaken to care for her).

a case of a father who does care,[31] who cared enough to furnish that child with the type of treatment that in his judgment was best.

It should be recognized that the healing arts have not yet reached a point of perfection. People die every day;[32] many without reaching a ripe old age.[33] People die when they are under the care of the most well-recognized practitioners in the land.[34] People die in hospitals and on operating tables. Indeed, doctors themselves are mortal. And those who are alive cannot claim perfect health even when they are under the care of the best that any healing art can offer.[35]

It must also be recognized that sometimes people who are treated by the majority-recognized healing arts die or become maimed because of that treatment. It needs no citation to note that people die on operating tables because of surgical accidents or because the body sometimes cannot take the knife. It needs but a reading of

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[31] Tr. 39, 43, 153, 196, 201, 203-41, 650, 1182, 1193.

[32] In 1962, for example, there were 1,756,720 registered deaths in the United States. See Report of Public Health Service in 1963 Annual Report of Department of Health, Education, and Welfare, p. 125.

[33] E.g., in 1962 about 1 infant in 40 died within a year of birth in the United States. Id. at 126.

[34] See, e.g., Tr. 70 (testimony of Robert R. Eggen, M.D., Chief Pathologist and Coroner of San Diego County, California); Tr. 576 (testimony of Homar R. Irwin, M.D., that the type of pneumonia which Rhea Sullins had at her death "is fatal in ten to twenty per cent of cases if every known treatment available is given.").

[35] The United States Public Health Service reports that "74 million Americans have one or more chronic conditions or impairments. This represents 42 percent of the Nation's civilian non-institutional population." 1963 Annual Reports of the Department of Health, Education and Welfare, p. 124. During 1962 the average American experienced "16.3 days of restricted activity" because of disability, chronic and acute illnesses. "Of this total, 6.4 days were spent in bed." Id. at 124-25.

the morning newspaper to realize that drugs can often kill or permanently injure. As the Medical Director of the Food and Drug Administration has well stated: "There isn't any drug without hazard."[36] Indeed, says the United States Public Health Service, unwanted side effects of drugs amount to one of the nation's leading diseases. Some 1.3 million Americans each year, it is said, are significantly sickened by adverse reactions to medicine.[37] And books and articles are written on the problems of allergic reactions to drugs and the problems of drug-induced schizophrenia.[38]

One may read day after day of action on the part of the Food and Drug Administration to restrict or withdraw drugs on the market and of congressional hear-

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[36] Joseph F. Sadusk, M.D., quoted in Life Magazine, July 3, 1964, p. 38, col. 4. Dr. T. Sollman, a distinguished pharmacologist, has said: "It is necessary still to emphasize that the administration of potent drugs involves a 'calculated risk' where the presumptive benefit is balanced against the possibilities of toxic effects and idiosyncrasies." Hearings Before Intergovernmental Relations Subcommittee of House Committee on Government Operations, 88th Cong., 2d Sess., p. 147 (March 24, 1964). The subcommittee noted: "There is no such thing as absolute safety in drugs . . . . There are drugs that are less liable to cause harmful reactions than others, but people die every day from drugs generally regarded as innocuous . . ." Ibid.

[37] Reported in Life Magazine, July 3, 1964, p. 38, col. 2. See Max Levin, M.D., American Handbook of Psychiatry 1223-30 (1959).

[38] E.g., Alexander, Reactions with Drug Therapy (1955); Max Levin, M.D., American Handbook of Psychiatry, pp. 1223-30 (1959); Van Winkle, "The Safety of New Drugs," 2 Stanford Medical Bulletin No. 3, pp. 103-7 (August 1944); Smith, "Problems Raised by New Drugs," XIX Assoc. of Food and Drug Officials of U.S. No. 4, pp. 144-50 (Oct. 1955); Smith, "Evaluation of Safety of New Drugs," 1 The Journal of New Drugs No. 2, p. 59 (Mar.-Apr. 1961); Popper, "Drug Induced Liver Disease," 115 Archives of Internal Medicine, pp. 129-36 (Feb. 1965); Welsh, The Fixed Eruption (1961); Welsh, Side Effects of Anti-Obesity Drugs (1962); "No Absolute Safety," 54 Journal American Pharm. Ass'n 217-20 (May 1964).

ings developing laxity on the part of the policing effort.[39] One need only mention thalidomide[40] and parnate[41] (Wash. Post 2/25/64) to appreciate what may occur from drugs. But one can also mention orabilex[42] phenacetin,[43] meclizine, cyclizine and chlorcyclizine,[44] and many others.[45]

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[39] E.g., Washington Evening Star, Oct. 25, 1965, pp. A-1, A-6; Washington Post, June 10, 1965, p. A9; Washington Post, June 11, 1965, p. A3; Washington Post, October 25, 1965, pp. A1, A15. See Harris, The Real Voice (1964).

[40] Phocomelia and Internal Defects Due to Thalidamide, British Med. Journal, Dec. 15, 1962, p. 1447; Thalidamide Babies, British Med. Journal, August 25, 1962, p. 523; Deformities Caused by Thalidamide, H.M. Stationery Off., Minister of Public Health.

[41] Washington Post, February 25, 1964, p. A1. For a more detailed description, see Hearings Before Intergovernmental Relations Subcommittee of House Comm. on Government Operations, 88th Cong., 2d Sess., p. 686 (Jan. 25, 1965).

[42] Washington Post, February 14, 1964, pp. A1, A8; see Hearings Before Intergovernmental Relations Subcommittee of House Committee on Government Operations, 88th Cong., 2d Sess. at 865 (June 17, 1964).

[43] Washington Evening Star, January 4, 1964, p. A2.

[44] Washington Evening Star, May 6, 1966, p. A2.

[45] E.g., penicillin has been reported by a Food and Drug Administration Committee to cause allergic reactions ranging "from mild and transient manifestation to fatal anaphylactic shock . . ." FDA Report on Enforcement and Compliance, Feb. 1965, p. 5. Dr. Howard Weinstein, M.D., research director of the Food and Drug Administration has been quoted as saying: "about 3000-4000 persons in the United States suffer severe reactions to penicillin each year, and of these 300-400 die." Waimbrand, Max. N.D., D.C., The Encyclopedia of Natural Health 101 (1962). See also id. at 336-38 for references concerning effect of digitalis and mercurial diuretics. For the effect of phenmetiaizin, see Phenmetiaizin and Foetal Abnormalities, British Medical Journal, Dec. 15, 1962, p. 1610; of ancoloxin, see Thalidamide Babies, British Med. Journal, August 25, 1962, p. 523; of flexin, see Hearings Before Intergovernmental Relations Subcommittee of House Committee on Government Operations, 88th Cong., 2d Sess. at 568, Exhibit No. 2 (April 28, 1964); and of chloromphenical, see Id. at 229 (March 25, 1964), and Alexander, Reactions with Drug Therapy 104 (1955).

The issue in this case is not whether all drugs should be banned or whether medical science should be outlawed. Rather the issue in this case is whether one can choose for himself and his family not to be subjected to such dangers; whether one has the right to choose to follow a healing art that is not in the majority.

There are several such dissident healing arts in this country. The healing art in the majority is allopathy, which believes strongly in the use of surgery and drugs.[46] In the minority today, although once in the majority, is homeopathy, which believes in a bare minimum use of drugs. Also in the minority but no longer pilloried in most states are osteopathy and chiropractic, which place heavy or exclusive reliance upon manipulation along with diet control. Further, there are the healing arts that focus almost entirely upon diet, disavowing drugs of all types, and depending upon foods and withholding of foods to assist the body in curing its own ills. Here there is a belief that many or all ills are caused by the presence of toxins which must be eliminated so that the body functions can be restored; drugs being toxins are of no assistance.

This case concerns the right of a person to choose among these various healing arts, majority or dissident, and to practice the healing art of his choice upon himself and, at least until the state steps in as parens patriae, upon his children. This issue has not yet come before this Court. But it is of fundamental importance warranting review in this case.

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[46] That the majority itself is far from unanimous in its view is common knowledge. See, e.g., Ingelfinger, Relman, and Finland, Controversy in Internal Medicine (1966).

Petitioner in this case, knowing of the admitted dangers of drugs and surgery,[47] in the exercise of mature judgment, and what he considered the best of due care, chose a dissident healing art for himself and for the child that he loved.[48] If this be a crime, then all healing art will remain static, where the majority now has it placed. If this be a crime, then the majority when our country was founded could have enforced with the threat of jail or worse the then prevailing practice of bleeding those who were sick—and sometimes, as in the case of President George Washington, bleeding them to death. If this be a crime, then a Sigmund Freud could not come forth with new theories of the twentieth century and expect to find any patients. If this be a crime, then a man no longer has a right to choose the means of protecting and preserving what is fundamental to his own life and well-being, his health. He is limited to following the majority in what must be admitted to be an imperfect art.

Ample testimony in this case shows that diet control and fasting is a recognized practice. It is followed by chiropractors[49] and by medical doctors.[50] And it is

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[47] Tr. 370-73, 211, 404, 436. Mr. Sullins stated: "But after thalidamide and a few things like this, why, it becomes of concern to people like me who are watching it carefully .... And I'm watching it carefully because there's been some very, very tragic examples my—among by brothers and sisters." (Tr. 436).

[48] See note 31, supra. Also see Tr. 401, 404, 517, 520. Mr. Sullins consulted Dr. Shelton of Texas (Tr. 155, 635, 638-48) whom he considered the best in the country (Tr. 350, 381).

[49] E.g., Tr. 239-40, 249-51, 265 (testimony of Jordan B. Jensen, D.C.); Tr. 273, 319, 321-23, 326-27, 330 (testimony of Gerald Benesh, D.C.); Waimbrand, Max, N.D., D.O., The Encyclopedia of Natural Health (1962).

[50] E.g., Tr. 492, 496-500, 505-07, 515 (testimony of Henry G. Bieler, M.D.); Tr. 743 (testimony of Robert P. Watterson, M.D.); Tr. 602 (testimony of Victor A. Mueller, D.D.S.); Henry Lindlar, M.D., Natural Therapeutics 1-51 (1926).

recognized and licensed as a healing art in many states.[51] If it be quackery, it be so only because the majority and the powerful who define quackery choose to call it such. What must be the law was perhaps best summed up by the Supreme Court of Florida in *Baldor* v. *Rogers,* 81 So. 2d 658, (emphasis added):

> [T]he heroic effort being made by members of the medical profession and other scientists only emphasizes that an enemy is so far being fought in the dark and that *one man should not be condemned from the fact alone that he chooses a weapon that another may consider a reed.* . . . How strange would now appear a judicial decision made a few generations ago that a physician who did not bleed his patient was so callous to accepted treatment that he was a malpractitioner.

There is today a respectable minority that eschews drug therapy and that chooses to rely on diet and on fasting. This minority has gained recognition in many states through licensing of practitioners who treat others in this manner. Although not every state chooses to permit one to practice this healing art for gain upon others unless the practitioner also has knowledge of other healing arts (see *Hitchcock* v. *Collenberg,* 140 F. Supp. 894 (D. Md., three judge court), affirmed 353 U.S. 919), no state should be able to prohibit a li-

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[51] E.g., Va. Code 24-273 (1958); Ohio Rev. Code Ann. 4731.15; Indiana Stat. Ann. 63-1312 (Burns ed.); Ill. Stat. Ann. Tit. 91, Sec. 9; Alabama Code, Tit. 46, Sec. 259; Michigan Stat. Ann. 14:533. Several states provide expressly that (in the words of the Minnesota statute): "The several boards or other officers whose duty it shall be to administer or carry into effect the provisions of this chapter shall . . . in no manner discriminate against any system or branch of healing." Minn. Stat. Ann. 146:15. See also Iowa Code Ann. Vol. 9, Chap. 146.2; Kansas Stat. Ann. 65-2802; Col. Rev. Stat. 91-1-6, 91-5-4 (1963). See also § 1000-7, Calif. Bus. & Prof. Code; Oosteveen v. Bd. of Med. Examiners, 112 Cal. App. 201, 246 P.2d 136; Crees v. Bd. of Med. Examiners, 213 Cal. App. 2d 195, 28 Cal. Reptr. 621.

censed practitioner of a healing art from advising diet control as a part of his therapy. Nor should a state that has not reached ultimate omniscience punish one who chooses to forego drugs and utilize methods of natural hygiene and fasting as the healing art of his choice. In *Hitchcock,* while ruling that the State of Maryland need not license a naturopathic practitioner who lacks certain medical knowledge, the three-judge court went out of its way to emphasize that Maryland "does not prevent plaintiffs from applying the tenents of naturopathy in their treatment of themselves and their families . . . ." Yet, California has now punished this petitioner for this very act.

It may be argued that petitioner had a right to practice what he will upon himself; but when it comes to his daughter certain lines must be drawn. This case does not require that a decision be reached encompassing all conceivable practices. It involves one only: the failure to take his daughter to a medical doctor but instead following the practices of naturopathy. It involves the right of a parent to choose for his child a healing art that has respectable recognition in practice and in the law; a right and indeed a duty possessed by the parent at least and until the state assumes whatever power it has as parens patriae to supplant the judgment of the parent.

Petitioner it must be recognized was not really convicted for practicing naturopathy. Rather he was convicted for having practiced upon his child the tenents of naturopathy and having failed. Thus it is the basic teaching of the court below that one may dissent in the healing arts only at the risk of facing criminal charges should the patient die. This is not the sword hanging over the practice of the majority-blessed healing art. Allowing this sword to hang over the dissidents removes any right to dissent. What is now practiced by

the majority becomes sacrosanct; no medical doctor is criminally charged for administering a drug that fails to cure; no drug company is held criminally responsible for putting such a drug on the market. Yet the dissidents must cure or face the wrath of the state. This cannot be the law. Benjamin Rush, medical doctor and signer of the Declaration of Independence, is reported to have summed it up in these terms: "The Constitution of the Republic should make provision for medical freedom as well as religious freedom. To restrict the art of healing to one class of men and deny equal privilege to others will constitute the bastile of medical science."[52] That is the issue of this case that calls for review by this Court.

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[52] Quoted in 3 Medical Freedom 2 (1914). In two lectures in 1801 Dr. Benjamin Rush stated in precise terms the central issue of this petition:

> "I shall begin by briefly enumerating the causes which have retarded the progress of our science . . . . 21st. The interference of government in prohibiting the use of certain remedies, and inforcing the use of others by law. The effect of this mistaken policy has been as hurtful to medicine, as a similar practice with respect to opinion, has been to the Christian religion. 22d. Conferring exclusive privileges upon bodies of physicians, and forbidding men of equal talents and knowledge, under severe penalties, from practising medicine within certain districts of cities. Such institutions, however sanctioned by ancient charters, are the bastiles of our science." The Progress of Medicine, A Lecture (1801).

> "Let me remind you, that improvement in medicine is not to be derived, only from colleges and universities. Remember how many of our most useful remedies have been discovered by quacks. Do not be afraid, therefore, of conversing with them. . . . Medicine has its Pharisees, as well as religion. But the spirit of this sect is as unfriendly to the advancement of medicine, as it is to Christian charity. . . . further . . . let me advise you to converse with nurses and old women. Even negroes and Indians have sometimes stumbled upon discoveries in medicine." The Vices and Virtues of Physicians, A Lecture (1801).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should be granted.

Respectfully submitted,

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